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No. 73-1610

FILED

APR 26 19

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

LEE N. ROMANO and SCHAUMBURG PLANET PROJECT CORPORATION,

Petitioners,

vs.

DEPARTMENT OF PUBLIC WORKS AND BUILDINGS OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners, Lee N. Romano and Schaumburg Planet Project Corporation, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered on January 29, 1974.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 56 Ill.2d 121, 306 N.E.2d 1 and is reproduced as an appendix to this petition (App. B, App. 5-15). The opinion of the Appellate Court of Illinois is reported at 6 Ill. App.3d 752, 286 N.E.2d 558. (App. C, App. 16-28.)

JURISDICTION

The decision of the Supreme Court of Illinois was rendered on November 20, 1973. A timely petition for rehearing was filed, but was denied on January 29, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

Whether the attorney representing the State in a condemnation proceeding to take a citizen's property, has no greater responsibility for fairness than any civil litigant in a trial in which the State is not a party, or whether the State's counsel has responsibilities of candor and fairness (requiring him to protect or at least not violate the constitutional right of condemnee to just compensation under the Fourteenth Amendment), similar to those which this Court has held the Fourteenth Amendment imposes upon prosecutors in criminal cases.

Whether the State, in taking a citizen's property by condemnation for the right-of-way for a federal interstate highway, to be paid for by federal and State funds, has a duty under the just compensation and due process guarantees of the Fourteenth Amendment to accord the property owner a fair trial and to refrain from deliberately placing before the jury evidence known to be inadmissible and highly prejudicial to the property owner, for the purpose of inducing the jury to return a verdict for less than the owner is constitutionally entitled to receive.

Whether a state court hearing the trial or appeal of a condemnation action involving Federal and State Funds has a constitutional duty to protect the just compensation and due process rights of the citizen whose property is being taken, by preventing State action which is patently and deliberately designed to prejudice the jury by induc-

ing the jury to return a verdict for less than the just compensation guaranteed to the owner by the Constitution.

Whether the absence of effective protection by the State courts in these circumstances, renders the constitutional guarantee of just compensation illusory and meaningless.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

The State of Illinois acquired, through this eminent domain proceeding, 20 acres of an 86-acre tract in northwestern Cook County for the right-of-way in connection with a federal interstate highway, to be paid for by federal and state funds. Based on Illinois "quick take" procedures, the State acquired possession of the property following a preliminary court hearing. At that preliminary court hearing the State's expert witness testified that the value of the property taken was $507,200, and that the remaining property in the tract would suffer damages from the taking ("damage to the remainder") in the amount of $93,400—a total of $600,600. Under the Illinois "quick take" procedures, a deposit was made by the State in the amount of $750,750 (125% of the estimated damage figure of the State's expert witness).

At the condemnation trial the State did not adhere to its own evidence in the "quick take" proceedings, but instead used three new expert witnesses, who testified to values for the property taken ranging from $371,718 to $413,000. These State trial experts testified not only that the portion of the property which was not taken (the "remainder") would suffer no damage, but they also testified that the remaining property would increase in value by specific amounts ranging from $65,200 to $130,614. The total disparity between the State's testimony on the "quick take" and at trial was over ⅓ of a million dollars. This discrepancy on its face demonstrates the complete lack of recognition by the State of any constitutional duty to afford the owner the "just compensation" guaranteed by the Constitution. As we shall point out, this cavalier approach to constitutional guarantees was further illustrated by the State's actions during the condemnation trial.

The owner's expert witnesses testified to much higher figures for the value of the property taken, and to more than $2 million of damages to the remainder.

The jury returned a verdict awarding only $454,300 as the value of the property taken and no damage to the remainder. As a result of this extraordinary verdict, the owner, who had withdrawn $524,600 of the "quick take" deposit (which had been based upon the State's own expert testimony), has now been ordered to repay $70,278 of this amount to the State.

The owner appealed from a judgment sustaining this verdict, complaining that his constitutional right to just compensation had been abridged and his right to a fair trial had been frustrated by the unfair and improper techniques of counsel for the State in deliberately placing before the jury inadmissible and prejudicial evidence. The

owner also specifically complained that the trial court in its rulings upon evidence and its failure to give instructions had not protected the owner's rights to a fair trial. The Appellate Court of Illinois affirmed, but certified the case for mandatory review by the Supreme Court of Illinois on the ground that the case involved questions of such importance that it should be decided by the Supreme Court. Supreme Court Rule 316, Ill. Rev. Stats., 1973, ch. 110A, §316.

The Supreme Court of Illinois affirmed. However, of the four issues discussed in its opinion only one was decided on the merits. The other three issues were brushed aside on grounds that the objections of the owner's counsel were insufficient, that instructions on the issue had not been properly tendered, that false evidence of one of the State's expert witnesses had been corrected on subsequent cross-examination, and by a statement that the verdict was within the range of the evidence and that any errors would not require reversal.*

But the prejudice to the owner, deliberately introduced into the record in the presence of the jury by the tactics of the attorney for the State, an expert specializing in eminent domain, cannot be so casually dismissed.

He supported one of his expert witnesses in making a false suggestion to the jury that the owner could eliminate any access problem by widening the narrow 2-lane access road at will. This suggestion was particularly prejudicial, since one of the principal issues concerning damages to the remainder centered around the inadequate access af-

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* This approach of avoiding the merits of the owner's contentions was also followed by the Illinois Appellate Court. 286 N.E. 2d at 563-565.

forded by the pre-existing 2-lane road to the proposed highrise development on the remainder.

The attorney for the State took pains to place in the record evidence of substantial and specific dollar amounts of alleged benefits to the remainder, knowing that this would inevitably cause the jurors, contrary to the Illinois Constitution, the Illinois Eminent Domain Act, and a long line of Illinois cases, to set-off these alleged "benefits" against the award for the property taken. The prohibition against a "set-off" is specifically recognized in the textbook written by the attorney for the State. Frank S. Righeimer and Frank S. Righeimer, Jr., *Eminent Domain in Illinois* (1962) §5.06 at 58, note 134.

On cross-examination of one of the owner's experts, counsel for the State deliberately asked the witness if it was not a fact that the witness had previously testified in another condemnation suit involving the taking of a portion of the property across the street from the subject property that the "remainder" of this other property would suffer no damage from the taking. By asking this question, counsel for the State deliberately placed before the jury inadmissible evidence. He knew that he could not introduce the testimony suggested by his question as direct evidence, *Forest Preserve District* v. *Chilvers*, 344 Ill. 573 (1931), and his own textbook specifically states that such cross-examination is improper:

> "It is, however, improper to cross examine an opinion witness on value of property which under the rules of evidence, the cross examiner could not put into evidence on direct testimony." Frank S. Righeimer and Frank S. Righeimer, Jr., *Eminent Domain in Illinois* (1962) §5.043 at 38.

We indicate more fully in Appendix A to this petition, the pertinent facts with respect to the three issues which

were brushed-off so cavalierly by the Supreme Court of Illinois. In requesting that this Court reverse for a new trial, we do *not* seek to have this Court review those issues on their merits.

Rather, they are significant because they lay bare the constitutional violations by counsel for the State and by the Illinois courts in this case. These particular examples demonstrate the utter failure of the State of Illinois and its counsel and of the Illinois courts to recognize and apply the principle that the State, when taking the property of its citizens pursuant to the power of eminent domain, must deal fairly and candidly with the citizen-property owner. The requirement precludes the unfair and improper strategy of the State's counsel in this case and obligated the Illinois courts to take affirmative corrective action to overcome that unfairness when it appeared.

After the Supreme Court of Illinois had denied all relief and refused even to consider the merits of the owner's objections, petitioners specifically complained in their petition for rehearing (pp. 2, 3, 16, 17, 18 and 19) that the actions of the attorney for the State and the refusal of the Illinois courts to accord petitioners a fair trial had infringed petitioners' rights to just compensation and petitioners' due process rights under the Fourteenth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

The State of Illinois and Its Courts Have Repudiated Their Constitutional Duty of Candor and Fairness to Citizens in Eminent Domain Proceedings.

The gravity and national importance of the issues raised herein are indicated in part by the number and magnitude of the condemnation awards made each year. Seven years ago—in 1967—more than $8 billion was paid or awarded for property taken for public use. See, Forward, *Eighth Institute On Eminent Domain* (1967). Of course, no dollar figure can adequately measure the impact of eminent domain upon the lives of the individual citizens whose homes or other property are taken by the State.

The predominant question in this case is whether a State (using federal funds) may take a citizen's property by eminent domain and utilize any trick or technique to reduce the "just compensation" to which the property owner is constitutionally entitled under the Fourteenth Amendment by deliberately introducing inadmissible and highly prejudicial matters to the jury, without accepting any responsibility for the unfairness of the proceedings or for the grossly unjust compensation which results.

In this case, counsel for the State treated the serious issues of eminent domain as a game of wits. He brought in three experts who testified to damages which were far less than the damages which the State's own expert had testified to under oath in the "quick take" proceeding. He used almost every possible technique to implant in the minds of jurors improper and prejudicial matters which would influence them to reduce the amount of the award

below what it would have been on the basis of properly admissible evidence. See Appendix A.

Counsel for the State in this case is a highly sophisticated and experienced specialist in condemnation litigation and an author of a famous textbook on the subject. Therefore, the improper and prejudicial material which he deliberately placed before the jury could not be the result of ignorance or inadvertence, but must necessarily have resulted from a determination to obtain the lowest possible condemnation award from the jury without regard to the fact that the owners' constitutional right to "just compensation" might be infringed in the process.

These tactics could only have been based upon a conception that counsel had no duty of fairness to the owner and no duty to the Court to avoid placing inadmissible and prejudicial matters before the jury. Counsel is apparently under the impression that the trial of an eminent domain proceeding is a "game" in which he is entitled to use any trick to induce the jury to reduce the condemnation award, and to beguile the trial court into failing to take effective protective action.

The Illinois courts similarly viewed their role in eminent domain proceedings as that of an inactive umpire in an ordinary civil dispute involving two private litigants. The concept ignores the fact that an eminent domain proceeding involves the extraordinary power of government to take a man's property against his will—a power limited by the requirement that the State honor the constitutional guarantee of "just compensation". The Illinois courts, as demonstrated by the instant case, believe that eminent domain proceedings do not place any constitutional protective responsibility on counsel for the State or on the courts. They shrug off serious prejudicial conduct by the State before the jury by noting that the

award is within the "range of the evidence," or by finding some fault with the sufficiency of objections by the property owner's counsel.

In criminal cases this Court has rejected that limited adversary concept of the duties and responsibilities of government counsel. In leading cases such as *Mooney* v. *Holohan,* 294 U.S. 103 (1935); *Napue* v. *Illinois,* 360 U.S. 264 (1959); *Giglio* v. *United States,* 405 U.S. 150 (1972); and *Brady* v. *Maryland,* 373 U.S. 83 (1963), prosecutors who thought their only responsibility was the securing of a conviction, by whatever means, found those convictions reversed on the basis of the requirements of the United States Constitution. In those cases, state court judges who thought that they bore no responsibility for the fairness of the trials other than to umpire the conflicting contentions of counsel, found that their inaction had condoned a violation of a defendant's Fourteenth Amendment rights.

In *Brady* v. *Maryland,* 373 U.S. 83 (1963), this Court made the following eloquent statement which summarizes the true role and responsibility of government counsel:

> "The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: '*The United States wins its point whenever justice is done its citizens in the courts.*' " [Emphasis supplied].

The application of this principle to civil cases has been well stated in the American Bar Association's *Ethical Considerations* 7-14 as follows:

> "A Government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results."

Unquestionably, with the thousands of State and Federal eminent domain proceedings each year, attorneys representing the government need this Court's admonition that a condemnee must be given a "just compensation" award free of unfair influence by the attorney for the government.

Different rules frequently apply to civil and criminal cases. But these differences do not call for different treatment where the basic constitutional protection of the citizen's life, liberty or right to enjoy property without unlawful deprivation are involved. This is particularly true where, as here, a specific constitutional mandate of "just compensation" reinforces the general right to due process of law. The need for protection of individual rights is especially compelling in an eminent domain case, where the government assumes the role of an aggressor against an unoffending citizen and where the taking of that citizen's property often has a serious impact upon the person's life and future wellbeing.

This Court recently rejected an attempt to minimize the importance to individual citizens of rights in property guaranteed to them by the Constitution. In *Lynch* v. *Household Finance Corporation*, 405 U.S. 538 (1972), this Court rejected a "personal right-property right" distinction under 28 U.S.C. §1343(3), stating (405 U.S. at 544, 552):

> " 'It cannot be doubted that among the civil rights intended to be protected from discriminatory state

> action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.' *Shelley* v. *Kraemer,* 334 U.S. 1, 10, 68 S. Ct. 836, 841, 92 L.Ed. 1161."
>
> "Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. *In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.*" (Emphasis Supplied).

Most significant public works projects involve the use of federal funds. When the power of eminent domain is invoked, the State acts as the aggressor, taking away citizen's property (often his home) without the citizen's consent and frequently on short notice. The impact upon the citizen may frequently be equally as serious as conviction for a criminal offense. This serious impact of eminent domain upon the citizen and the potential for abuse of government power in condemnation proceedings was recognized and guarded against by the following provision of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970:

> "Before the initiation of negotiations for real property, the head of the Federal agency concerned shall

> establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property." (Pub.L. 91-646, Title III, § 301, 42 U.S.C. §4651.

Yet, in Illinois and many other states, trials in eminent domain proceedings are commonly viewed by counsel for the State as "games." Efforts are systematically made without compunction to place before the jurors information which would not be admissible as evidence, but which is calculated to prejudice the jury against the award of just compensation to the property owner. State courts routinely brush aside appeals by contending that objections have not been sufficiently preserved, or that the error is "harmless" because the verdict is "within the range of the evidence." That is what happened in this case.

There is a critical need in this area of the law for an enunciation by this Court that the State's duties and responsibilities in eminent domain proceedings encompass fairness and justice—not just "winning" or achieving low condemnation awards.

In light of the fact that at least $8 billion a year of condemnation awards are made by juries in the Federal and State courts, it is evident that the issues raised by the instant case are of great national importance and should be decided by this Court. Plenary consideration of this case is required to prevent abuses by the government with respect to thousands of citizens whose property is being taken for public use, and who will suffer severe injury if they are not awarded just compensation as required by the Constitution.

CONCLUSION

For the reasons set forth above, petitioners pray that this Court grant the Writ of Certiorari and set this case for plenary consideration.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

TO PETITION FOR CERTIORARI

The three issues summarized below are examples of many instances in which the attorney for the state deliberately suggested inadmissible matter to the jury or otherwise acted to prejudice the rights of the owner to just compensation and due process of law. None of these three issues was decided by the Illinois Supreme Court on its merits. In each case the objections were brushed aside on technical grounds.

1. Although the trial judge recognized that alleged "benefits" to the remainder could not be used to reduce the award for the property taken, he nevertheless permitted the State's expert witnesses to testify to specific and substantial dollar amounts by which the remainder would supposedly be benefited by the taking. Two of the State's experts testified to benefits slightly in excess of $65,000. The third testified that the remaining property would increase in value by $130,000.

The trial judge permitted this testimony even though the jury could not, by law, deduct even one dollar of such supposed benefits to the remainder from the value of the part taken. This error was further magnified by the trial court's failure to give a jury instruction admonishing the jury that it could not so deduct. The obvious purpose of the State in introducing this testimony was to induce the jury to deduct, contrary to law, benefits to the remainder from the value of the part taken.

The Supreme Court of Illinois did not deal with this issue on the merits. Although the Court recognized that the owner's counsel had objected to the admission of evi-

dence of *any benefits* to the remainder, the Supreme Court concluded that the owner could not raise the issue, because no specific further objection had been made at the time the specific dollar amounts of benefits were stated and because no suggested jury instruction had been tendered. 306 N.E. 2d at 4-5. An objection to evidence as to *any benefits* whatever obviously includes an objection to evidence as to specific dollar amounts of alleged benefits. Moreover, the Supreme Court of Illinois blithely ignored the fact that the trial judge on two occasions specifically stated that he would not take any jury instructions not verbatim with the Illinois Pattern Jury Instructions, and these form instructions did not contain any instruction which would protect the owner on this point.

2. One of the principal issues concerning damage to the remainder involved a comparison of access by road to the property before and after the taking. Prior to the taking, it was undisputed that the owners had three-quarters of a mile of frontage on and access to two state highways. After the taking of all this ¾ of a mile of direct access, the only meaningful access to the remainder was limited to the indirect access afforded by a 20 foot wide, two-lane road (Martingale Road) which opens onto Higgins Road, a six-lane divided express highway.

The owner's evidence showed that this severe restriction on access had greatly diminished the value of the remaining property.

In order to combat this evidence, the witness and counsel for the State deliberately created a false impression in the jury's presence that the owner could widen this access at will. One of the State's expert witnesses testified on cross-examination:

> "A. You have six lanes on Higgins Road, you only have two (viz.: Martingale Road) shown there

(viz.: State's final plans). You have given a hypothetical situation there. What if there was no driveway access at all? *New driveways can be constructed, sir.*"

He also stated:

"A. That 750 cars *was based on a widened entrance.*" (R. 880 or 881) (Emphasis supplied.)

The owner's counsel made a timely motion to strike this testimony on the ground that it was not based upon the State's final construction plans which had been received in evidence and which contemplated no widening of the existing two lane road. [In fact, to this date, the two lane road is the only access to the property and cannot be widened under State law without the consent of the Illinois Highway Department.] Counsel for the State, however, aggravated the prejudicial effect of his witnesses' testimony by stating in the presence of the jury

"That there is nothing to prevent anybody from widening the entrance here, nothing at all." (R. 882.)

The trial judge compounded the prejudice and inferentially suggested to the jury that counsel's statement was correct by denying the motion to strike and by failing to take any other action to eradicate or minimize the prejudicial effect of the testimony and of counsel's statement.

Again, the Supreme Court of Illinois did not deal with this issue on its merits. Although the court noted that the State's expert had testified to an inaccurate figure as to the number of vehicles which could move through the access, the court merely concluded that any error was not sufficient to require a new trial. 306 N.E.2d at 5-7. In adopting this approach, the Supreme Court of Illinois ignored the extremely prejudicial nature of the improper evidence. The facts demonstrated by the record—all of the residents of a high rise apartment and office building planned unit development being required to utilize a two

lane road to enter and leave the property—dramatically reveal the nature and extent of the injury to the remainder produced by the condemnation. By improperly suggesting that the owner could widen the access road at will, counsel for the State destroyed the impact of that proof of damage, one of the most important elements of damage in the case, and inevitably caused serious prejudice to the owner's rights.

3. The trial judge permitted counsel for the State, on cross-examination of one of the owner's expert witnesses, to ask whether it was not a fact that the witness had previously testified, in another condemnation suit involving the taking of a portion of the property across the street from the subject property, that the "remainder" of this other property would suffer no damage from the taking. It is clear that the State could not have offered this evidence affirmatively. Counsel for the State well knew that such cross-examination was grossly improper as is irrefutably evidenced by Counsel for the State's own book entitled *Eminent Domain in Illinois* by Frank S. Righeimer and Frank S. Righeimer, Jr., 1962, wherein the authors state at page 38 in §5.043:

> "It is, however, improper to cross examine an opinion witness on value of property which under the rules of evidence, the cross examiner could not put into evidence on direct testimony."

The Supreme Court of Illinois refused to consider the objection on its merits on the ground that proper objections had not been made by the owner's attorney, 306 N.E.2d at 15, ignoring the fact that the innuendo contained in the question asked by counsel for the State placed the improper suggestion in the jury's minds, rendering an objection useless.

APPENDIX B

OPINION OF THE SUPREME COURT OF ILLINOIS

No. 45427

THE DEPARTMENT OF PUBLIC WORKS AND BUILDINGS, Appellee, v. CARL G. KLEHM *et al.*—(Lee N. Romano *et al.*, Appellants.)

Opinion filed Nov. 20, 1973.—Rehearing denied Jan. 29, 1974

MR. JUSTICE WARD delivered the opinion of the court:

On July 8, 1968, the petitioner, the Department of Public Works and Buildings of the State of Illinois (the Department) brought an eminent domain proceeding in the circuit court of Cook County to acquire 20.65 acres of an 85.99-acre tract of land, which was located in northwest Cook County and which the petition alleged was to be used in the construction of an interstate highway. The owner of the tract, Carl G. Klehm, the Schaumburg Plant Project Corporation (the Corporation), which had contracted with Klehm to purchase the tract, and Lee N. Romano, the Corporation's president, were named as defendants in the action.

The entire tract, which is basically rectangular in form, is located at the southwest corner of the intersection of Higgins Road (Route 72) and Rohlwing Road (Route 53). About 2,645 feet of the tract fronts on Rohlwing Road and about 1,082 feet of it fronts on Higgins Road. Klehm did not own the very corner of the rectangle, where the two roads actually intersect. This corner, which was 189 by 205 feet, had been the site of a gas station which was not in use at the time the petition was filed. It is not

concerned in this litigation. The 20.65 acres which were taken from the tract was the land that immediately fronted on Rohlwing and Higgins roads.

Four months before the petition to condemn had been filed, Klehm had entered into a contract (styled by the parties as "installment contract to purchase real estate") with the Corporation to transfer title to the entire tract. This instrument, which we shall refer to as the Contract, provided that the purchase price of the tract was to be $1,700,000. It called for the payment of $10,000 as earnest money at the time of its execution, for $990,000 to be paid upon the "first closing," for $350,000 plus interest to be paid at "the second closing," and $350,000 plus interest was made payable at the "third closing." Dates were designated in the Contract for the three "closings." On the same date the Contract was entered into a "supplemental agreement" was executed by the parties which, as it is pertinent here, provided that at his option the seller Klehm was to have the right to select parcels of real estate in northeastern Illinois, which the purchaser, the Corporation, would then acquire with its own funds and transfer to Klehm. Any funds which would be expended by the Corporation to acquire these parcels designated by Klehm were to be "allowed [as] a credit against the purchase price" set out in the Contract. The supplemental agreement also provided that in the event all or part of the tract was condemned Klehm would satisfy his obligation to convey whatever land was taken by eminent domain by turning over to the purchaser the condemnation award. The agreement declared that the purchaser, *i.e.*, the Corporation, was to be obligated to conduct all litigation in connection with any eminent domain proceedings that might be instituted, and the agreement stated that if

the award per acre received in any condemnation proceeding was less than the per-acre price under the Contract the purchaser would be required to pay the difference to the seller. If the condemnation award per acre was greater than the Contract price per acre, under the agreement the seller was to pay to the purchaser the difference.

Klehm, under the Contract to sell for $1,700,000, received from the Corporation: $35,000 in cash; $524,600 in cash from the "quick take" award deposited by the petitioner; the purchaser's promissory note for $240,400, and 843 acres of land which were designated by Klehm pursuant to his option under the supplemental agreement. These lands were acquired by the Corporation for $900,000 and their transfer to Klehm was considered to satisfy the purchase price called for in the Contract to the extent of $900,000.

Under the "quick take" provisions of sections 2.1 through 2.10 of the Eminent Domain Act (Ill. Rev. Stat. 1967, ch. 47, pars. 2.1 through 2.10) hearings to determine preliminary "just compensation" were held on July 16, 1968, and the preliminary just compensation was fixed at $600,600. After a jury trial late in 1970, a verdict was returned awarding $454,300 as compensation for the taking of the 20.65 acres. The jury found there had been no damages to the remainder of the tract. The appellate court affirmed (6 Ill. App. 3d 752) after an appeal by the Corporation and by the defendant Romano. That court under our Rule 316 certified that the case involved a question of such importance that it should be decided by this court. Ill. Rev. Stat. 1971, ch. 110A, par. 316.

A claim is made by the appellants, the Corporation and Romano, that the trial court erred in permitting the Contract to go to the jury as evidence of the value of the subject property, because the transaction between Klehm and the purchasers, *i.e.*, the Corporation and Romano, really involved exchanges of real estate rather than a sale for cash. It is argued that the transaction between the parties was considered as an exchange by the Internal Revenue Service and that the instrument was designed to avoid a sale, which would have made the seller Klehm liable for capital gains tax. The appellants, citing *Jefferson Park Dist.* v. *Sowinski,* 336 Ill. 390, 393, and *Lanquist* v. *City of Chicago,* 220 Ill. 69, 72, say that exchanges of land are not admissible as comparable sales of property to assist a jury in establishing the value of the land.

In an eminent domain proceeding evidence of comparable sales of land may be admitted in most jurisdictions, including Illinois, as evidence of the value of the land which is the subject of the eminent domain proceedings. (85 A.L.R.2d 110.) Whether the evidence shall be admitted in a given case rests within the discretion of the trial court. (*City of Evanston* v. *Piotrowicz,* 20 Ill.2d 512, 522; *Sanitary Dist. of Chicago* v. *Boening,* 267 Ill. 118, 121.) Evidence of a previous sale of the tract of land that is the subject of the eminent domain proceeding may be admitted. (*Forest Preserve Dist.* v. *Hahn,* 341 Ill. 599, 603.) The underlying reason for admitting the evidence is that, depending on the similarity of the tracts being compared, the sales price paid in a voluntary sale of one parcel of land may tend to show the fair cash market value of the other parcel. Too, it provides an objective dollar market value for the jury to consider and compare with the testimony of appraisers as to the estimated value of the land to be condemned.

While evidence of comparable sales may be admissible, it is generally said that evidence of exchanges of land is not. (*Jefferson Park Dist.* v. *Sowinski,* 336 Ill. 390, 393; *Lanquist* v. *City of Chicago,* 200 Ill. 69, 72.) Evidence of a comparable sale gives the jury the benefit of an objective market evaluation, against which it can consider an appraiser's valuation of the property taken. (*People ex rel. Department of Public Works* v. *Reardon* (1971), 4 Cal. 3d 507, 483 P.2d 20, 93 Cal. Rptr. 852; 4 Nichols' The Law of Eminent Domain (3d ed. rev. 1971), sec. 12.311[3], at 125.) In the case of an exchange of lands, however, there is no objective market value presented for consideration by the jury, and the reason for admitting evidence of comparable sales is not present.

The appellate court did not err in holding that the trial court did not abuse discretion in admitting evidence of the Contract. The instrument clearly resulted in a contract of sale and not a bargain for an exchange of lands.

The instrument was designated as an installment contract to "purchase." It fixes a "cash purchase price" of $1,700,000, which was made payable in installments. It provides that if the award per acre was less than the per-acre value established in the Contract the purchaser was to pay the seller the difference between the price per acre called for in the Contract and the amount per acre received in the condemnation proceedings and that if the award per acre was greater than that called for in the Contract the seller was to pay the purchaser the difference. In making these provisions for the contingency of condemnation the Contract referred to the "per acre value established by said installment contract to purchase real estate." The agreement further provided that should the seller exercise his right to designate land to be acquired by the purchaser, any funds expended by the pur-

chaser to acquire the designated parcels were to be "allowed as a credit against the purchase price" set out in the Contract. It is evident that no simple exchange of lands was contemplated. The consideration to be received by the seller was $1,700,000.

We have no doubt that the Contract between Klehm and the Corporation established by agreement an objective dollar market value for Klehm's tract as of four months prior to the quick take of a portion of the tract. The trial court did not abuse discretion in providing the jury with evidence of an objective and voluntarily reached market value. Regardless of how the transaction may have been regarded for purposes of Federal taxation, the Contract was admissible.

We would add that the objections by the defendant to the introduction of the Contract in evidence were that the transaction involved was an exchange and not a sale. There was no objection of any significant change in circumstances (and no change is suggested) during the four months between the formation of the Contract and the filing of the petition by the plaintiff which might have affected the significance and the admissibility of the Contract.

Another contention of the Corporation and Romano is that the trial court erred in permitting the Department's appraisal witnesses to testify as to the dollar amount of the increased value of the remainder after the taking without instructing the jury as to this testimony. They claim the jury should have been instructed that if it found increased value to the remainder it could only consider the increase as a setoff to any damages to the remainder caused by the taking and that the jury should have been instructed that any increase in the value of the remainder could not be considered by it as an offset against the value of the property taken.

It is, however, admitted that at trial there was no request that instructions of the type described in their contention be given. The Civil Practice Act provides: "No party may raise on appeal the failure to give an instruction unless he shall have tendered it." (Ill. Rev. Stat. 1971, ch. 110, par. 67(3).) See also *Chicago Land Clearance Com.* v. *Darrow,* 12 Ill.2d 365, and *People* v. *Damen,* 28 Ill.2d 464, 469, where this court said: "[W]e have repeatedly announced the rule that the court is under no duty to give instructions not requested by counsel."

The appellants say further that if the trial court did not have any obligation to give instructions under the circumstances it should have prohibited the Department's witnesses from testifying as to any dollar amount of increased value to the remainder. They suggest that they did object to this character of testimony during a conference with the trial court held outside the presence of the jury. They concede that no objection was later made during the giving of the complained-of testimony. The record does not support the suggestion that this objection was made during the conference with the trial court. The record shows that the objection discussed with the court (which was not raised on appeal) was one made to any testimony which would suggest an increased value to the remainder because of benefits caused by improvements made on the condemned land. There was no objection to the evidence of dollar amounts. The record shows that when the defendants asked that a continuing objection be noted, the trial court instructed the defendant to make an objection at the proper time so that the record would be made clear. No objection was made and nowhere in the record does any objection to the testimony now challenged appear. The claim of error cannot now be asserted on appeal. *City of Chicago* v. *Giedraitis,* 14 Ill.2d 45; *Forest*

Preserve Dist. of Cook County v. *Lehmann Estate, Inc.*, 388 Ill. 416; *Illinois Iowa Power Co.* v. *Rhein*, 369 Ill. 584.

Another contention of error is that questions asked by the plaintiff of one of the defendants' valuation witnesses were improper and calculated to prejudice the jury, and also that the introduction into evidence of the Code of Ethics of the American Institute of Real Estate Appraisers was error. On cross-examination the Department's attorney had asked a defendants' valuation witness if he had testified in another case that property across the street from the tract involved in the petition was worth $40,000 an acre. The witness responded that he had. Defense counsel first objected and then withdrew the objection saying, "Let him answer, let him explain." The plaintiff's attorney went on to ask the witness if it was true that he had testified that there were not any damages to the remainder in the other case. When the witness answered "That's also correct," there was no objection. It is clear that because no objection was made in the trial court the defendants cannot contend on appeal that the questions presented were objectionable. Similarly there was no objection made to the admission of the Code of Ethics of the American Institute of Real Estate Appraisers at trial. The objection cannot be made for the first time on appeal.

The final claim of error is that the Department's attorney and one of his expert witnesses deliberately misled the trial court and jury and that the misleading and prejudicial testimony of the witness violated the defendants' constitutional right to just compensation. The record shows that after the defendants' experts had testified to the damage suffered by the remainder and the dollar amount of diminished value suffered from the tak-

ing, the plaintiff called a professional traffic planner to testify. The defendants' witnesses had based their opinions of damages in part on the reduced accessibility of the remainder from and to main traffic routes according to the plaintiff's final road plans, which had been received in evidence. The plaintiff's traffic planner testified that the village of Schaumburg had proposed a road plan that would extend Schaumberg Road and bring it in proximity to the remainder. The defendants objected to the question put to the witness and his answer, and in chambers argued that only the plaintiff's final road plan could be considered in determining accessibility. The trial court agreed and sustained the objection. The defendants did not make a motion to strike the question and answer and to instruct the jury to disregard them. In chambers the plaintiff made an offer of proof which detailed what the answer of the witness would have been as to the effect of the proposed road on the remainder's accessibility. We consider there was no error. The court sustained the objection of the defendants. The witness's comment was but preliminary to what the plaintiff's attorney, judging by his offer of proof, intended to develop through the witness. Too, the maps in evidence, when examined by the jury, would not have reflected the remark of the witness but only the plaintiff's final plans.

This witness also testified that a road leading to and from Martingale Road (which led to Higgins Road) could accommodate a maximum flow of 750 vehicles in one hour. An expert witness for the defense testified that this maximum would be 400 vehicles. On cross-examination defense counsel brought out that the plaintiff's witness was testifying to maximum car flow through the exit if the access were improved beyond the plaintiff's final plans and a

two-lane exit and entrance at Martingale Road were provided. The plaintiff's witness then admitted that under the plaintiff's final plans the maximum vehicle flow in one hour would be 400 vehicles. The defendant's motion to strike the witness's testimony because it was based on future possibilities and not on the plaintiff's final plans was denied. The defendant now argues that the testimony of this witness was the product of the plaintiff's attorney's deliberate design to prejudice the jury and that the testimony was so prejudicial that a new trial is required.

The record does not support the allegation that the plaintiff's attorney intentionally brought out the testimony based on future plans or possibilities to broaden the ingress and egress from Martingale Road, when the testimony should have been confined to the plaintiff's final road plan. To the contrary, the record negates the allegation. It shows that the defense objected to the witness making an estimate as to the number of vehicles which could be accommodated. The trial court said an estimate would be proper if the witness had examined the plaintiff's final plans and, based on them, had an opinion as to the vehicle flow. The plaintiff's attorney then asked the witness what the traffic flow would be "as it is now constructed." (The roads existing at the time of trial were according to the plaintiff's final plans.) It was then that the witness inaccurately said the traffic flow would be a maximum of 750 outbound vehicles in one hour, which was not based on the plaintiff's final plans. On cross-examination, the erroneous basis for the witness's opinion was brought out and he reformed his estimate and confirmed the testimony of the defendants' witness. The trial here was lengthy. Two weeks were required to try the issues. There are 1021 pages of transcript. We judge that under the circumstances any error was minimal and harm-

less. Under resembling circumstances in *Darling* v. *Charleston Community Memorial Hospital,* 33 Ill.2d 326, 338, we said: "But explanatory information was supplied on redirect examination, and for that reason we do not consider the initial error in admitting this evidence sufficiently prejudicial to warrant reversal." See also *Bruske* v. *Arnold,* 44 Ill.2d 132, 139, where we observed: " '[T]he ultimate question on review is not whether a trial was scrupulously free from error, but whether there was error which operated to the prejudice of the appealing party or unduly affected the outcome below. (*Nelson* v. *Union Wire Rope Corp.,* 31 Ill.2d 69, 118.)' In this instance, we hold that there was not."

The jury here viewed the lands concerned. The verdict it returned was well within the range of the evidence. What we said in *City of Chicago* v. *Shell Oil Co.,* 29 Ill.2d 136, 138, is appropriate here: "* * * where the jury's verdict is within the range of the evidence, and the jury has viewed the premises, the verdict will not be disturbed on appeal except in cases of passion, prejudice or clear and palpable mistake." See also *Department of Public Works and Buildings* v. *Lotta,* 27 Ill.2d 455; *Sny Island Levee Drainage Dist.* v. *Meyer,* 27 Ill.2d 530, and cases there cited.

For the reasons given, the judgment of the appellate court is affirmed.

Judgment affirmed.

APPENDIX C

OPINION OF THE APPELLATE COURT OF ILLINOIS

DEPARTMENT OF PUBLIC WORKS AND BUILDINGS of the State of Illinois,
Petitioner-Appellee,

v.

Carl G. KLEHM et al., Defendants,

and

Lee N. Romano and Shaumburg Planet Project Corporation, Defendants-Appellants.

No. 56079.

Appellate Court of Illinois,
First District, First Division.

June 19, 1972.
Rehearing Denied Sept. 7, 1972.

BURKE, Justice.

This was an eminent domain proceeding filed on July 8, 1968 by the Department of Public Works and Buildings of the State of Illinois to acquire 20.651 acres of an 85.958 acre tract of land situated in the northwest portion of Cook County, which was to be employed in the construction of an interstate highway. Named as defendants in the petition to condemn were Carl G. Klehm, the owner of the tract; Schaumburg Planet Project Corporation, which was under contract to purchase the tract; and Lee N. Romano, president of Schaumburg Planet Project Corporation. The jury returned a verdict awarding the sum of $454,300 as compensation for the 20.651 acres taken, and further finding no damages resulting from the taking

to the remainder of the tract. Lee N. Romano and Schaumburg Planet Project Corporation (hereinafter referred to as "defendants") prosecute this appeal from the judgment entered on that verdict.

The 85.958 acre tract of land in question (hereinafter referred to as "subject property") was located at the southwest corner of the intersection of Illinois Route 72 and Illinois Route 53, commonly known as Higgins Road and Rohlwing Road, respectively. The subject property was essentially rectangular in shape at the time of the filing of the petition to condemn, and had an east frontage of some 2,665 feet along Rohlwing Road and a north frontage of some 1,082 feet along Higgins Road; not included in the subject property was a small parcel of land at the immediate corner of the intersection, measuring approximately 205 feet by 189 feet. The 20.651 acres taken by the State was the easternmost and the northernmost portions of the subject property, fronting both on Higgins Road and on Rohlwing Road. At the time of the filing of the petition to condemn, the subject property was employed by Klehm in the growing of nursery stock.

It was contemplated that the interstate highway was to be constructed upon Rohlwing Road, and that Higgins Road was to be widened and improved. Four exit/entrance ramps were to be constructed providing access to and from the interstate highway and Higgins Road. The north, northeast and east perimeters of the subject property remaining after the taking, was to be serviced by a frontage road paralleling the south line of Higgins Road, the southwest interstate highway entrance ramp, and the west line of the interstate highway. Access to the frontage road was to be provided from the south line of Higgins Road upon Martingale Road, a north-south road which partly bordered the west line of the subject property.

The subject property was located in an area devoted mostly to farming at the time of the filing of the petition

to condemn. To the east of the subject property, across Rohlwing Road, was a 3,500 acre forest preserve area. To the north of the property, across Higgins Road, was vacant, unused land. On the northeast corner of the intersection was a dormant gasoline filling station and a food stand, and on the southeast corner of the intersection was a second dormant filling station. To the south of the property was farmland. To the west of the property and south of Higgins Road was a small residential area, to the west of which was vacant land, and about three miles west of the subject property were the residential areas of the Village of Schaumburg. About one half mile to the northwest of the subject property was the proposed Woodfield Mall shopping center, the construction of which had not commenced at the time of the filing of the petition to condemn but which was under construction at the time that the jury viewed the subject property during the trial of this cause.

There was some commercial and industrial development in the area about a mile north and west of the subject property prior to the filing of the petition, but it does not appear that there was development in the immediate area of the subject property between the time of the filing of the petition and the time of the trial of this cause. About a mile and a half to the north of the property, on Rohlwing Road, there was a full cloverleaf interchange on the Northwest Tollway.

Three appraisal witnesses testified for the State at the trial of the cause. James Curtis testified that he had appraised several properties in the general area of the subject property, that he was familiar with land values in the area, and that the highest and best use of the property was as a planned multi-family development, with a density of use of not more than twenty units per acre. He testi-

fied that the value of the subject property was $1,719,000 and that the value of the part taken was $413,000. He further testified that there was no damage to the remainder after the taking, but that there was an increase in value of the remainder after the taking of $65,500.

Charles Hodlmair testified that he had lived in the area of the subject property all of his life, and that he had been in the real estate business in the area for over 25 years. He testified that the highest and best use of the subject property was as a combination of uses under a planned development zoning, having a density of use of from ten to fourteen units per acre. The witness stated that the value of the subject property was $1,547,244, that the value of the part taken was $371,718, that there was no damage to the remainder after the taking, and that there was an increase in value to the remainder of $130,614.

Edward Smith was the third valuation witness for the State. He testified that he resided about five miles from the subject property, and that he had been in all phases of the real estate business in the area for over forty years. He testified that the value of the subject property was $1,633,200, that the value of the part taken was $392,400, that there was no damage to the remainder after the taking, and that there was an increase in the value of the remainder after the taking of $65,200.

Two appraisal witnesses testified for the defendants. William McCann testified that he had appraised the property across the road from the subject property, that he lived forty or fifty miles from the area of the subject property, and that he officed about thirty miles away. The witness' estimate of the highest and best use of the subject property was as a high intensity, planned unit development for multiple family dwelling, office and retail

uses, at fifty units per acre. He estimated that the value of the subject property was $4,300,000, that the value of the part taken was $1,025,000, that the damage to the remainder was $2,292,500, and that there was no increase in value to the remainder resulting from the taking.

Ralph Martin testified that he was a real estate broker since 1957 and that he officed several miles from the subject property. The witness testified that the value of the subject property was $4,300,000, that the value of the part taken was $1,030,000, that the damage to the remainder was $2,070,000, and that there was no increase in value to the remainder resulting from the taking.

The parties called several other witnesses who testified as to soil conditions on the subject property, traffic conditions on the bordering highways, sanitary facilities in the area, zoning, and the like.

Four months prior to the filing of the petition to condemn, Klehm entered into an "Installment Contract to Purchase Real Estate" and a "Supplemental Agreement" with the defendant Schaumburg Planet Project Corporation for transfer of title to the subject property.

The "Installment Contract to Purchase Real Estate" (hereinafter referred to as "Installment Contract") provided in part that the purchase price of the subject property was $1,700,000, payable as follows: $10,000 down; $990,000 by bank draft upon the "first closing"; $350,000, with interest, payable at the "second closing"; and $350,000, with interest, payable at the "third closing." A provision was incorporated into the contract relating to the dates to be set for the three "closings."

The Installment Contract further provided that title to the subject property would be guaranteed by the Chicago Title & Trust Company, at seller's expense, in the amount

of the purchase price, and that title to the property would be transferred as follows: a designated forty acres to be transferred by recordable warranty deed at the "first closing"; a designated twenty acres to be transferred by recordable warranty deed at the "second closing"; and the balance of the subject property to be transferred by recordable warranty deed at the "third closing."

The Supplemental Agreement, entered of even date with the Installment Contract, provided in part for the termination of "this contract" and the return to purchaser of the earnest money "deposited hereunder" in the event of failure to secure a designated re-zoning of the property and/or in the event of the failure to secure a hook-up agreement with the sanitary district authorities. The Supplemental Agreement also provided that, at the option of the seller, the seller had the right to designate parcels of real estate in northeastern Illinois for acquisition by the purchaser, with purchaser's own funds, which parcels of real estate would in turn be transferred to the seller by the purchaser in return for the subject property, and that any funds expended by purchaser in the acquisition of those other parcels of land (except attorney fees) shall be "allowed (as) a credit against the purchase price" set out in the Installment Contract.

The Supplemental Agreement further provided that in the event of the condemnation of all or part of the subject property, the seller shall satisfy his obligation to convey to the purchaser that part taken by turning over to the purchaser the condemnation award; that the purchaser was obligated to conduct all litigation in connection with any condemnation proceeding, in which seller would fully participate; and that

"• • • if the award per acre received in the condemnation proceeding is less than the per acre value established by said Installment Contract to Purchase Real Estate, purchaser shall pay to seller a sum equal to the difference between the price per acre established by the said Installment Purchase Contract and the price per acre received in the condemnation proceeding times the number of acres involved in said condemnation proceeding; and
"• • • if the award per acre received in the condemnation proceeding is more than the per acre value established by said Installment Contract to Purchase Real Estate, seller shall pay to purchaser a sum equal to the difference between the price per acre established by said Installment Purchase Contract and the price per acre received in the condemnation proceeding times the number of acres involved in such condemnation proceeding."

Defendants initially contend that the trial court committed reversible error in allowing, over their objection, the two contracts alluded to above to go to the jury as evidence of the value of the subject property, inasmuch as they involved exchanges of real estate rather than an outright, on-the-market cash sale. We disagree.

[1] The use of sales of comparable real estate as evidence of the value of the real estate sought to be condemned has long been established, and the admissibility of such evidence must be determined by the trial court within the proper limits of the court's discretion. City of Evanston v. Piotrowicz, 20 Ill.2d 512, 522, 170 N.E.2d 569, 575. That the contracts called for the sale, rather than the exchange of the subject property with other parcels of real estate, cannot be seriously disputed. Analysis of the contracts reveals that the parties thereto intended to treat the transaction as a cash sale of the subject property.

[2] The Installment Contract sets a "cash purchase price" for the subject property of $1,700,000, payable in installments. It is designated in its caption as an installment contract to "purchase" real estate, incorporates within its body the terms "sell" and "purchase," and designates the parties thereto as "seller" and "purchaser."

Likewise in the Supplemental Agreement the terms "sale," "purchaser" and "seller" are employed. The intent of the parties to the contracts, that the transfer of the subject property was to be for an established cash price, is manifest in the portion of the Supplemental Agreement dealing with the question of the condemnation. The parties there agreed that in the event that the award received per acre in the condemnation proceeding was lower than the "per acre value *established* by said Installment Contract to Purchase Real Estate" then the purchaser should pay to the seller a sum equal to the difference between the two said amounts, and that the reverse would obtain in the event the award price per acre was higher than the "price per acre *established* by such Installment Purchase Contract." (Emphasis supplied.)

The fact that the Supplemental Agreement provided an option to the seller to designate other parcels of real estate for the purchaser to purchase for and deed to the seller has little to do with the fact that the parties ultimately intended a cash sale of the subject property. The trial court did not abuse its discretion in allowing the contracts to go to the jury as evidence of the market value of the subject property at the time of the filing of the condemnation petition.

The cases cited by the defendants in support of their position are inapposite on their facts to the case at bar inasmuch as they involve transfers of real estate on bases other than for the fair cash market value. See Sanitary District v. Boening, 267 Ill. 118, 107 N.E. 810; Jefferson Park District v. Sowinski, 336 Ill. 390, 168 N.E. 370; Lanquist v. City of Chicago, 200 Ill. 69, 65 N.E. 681; People ex rel. Department of Public Works v. Reardon, 7 Cal. App.3d 856, 87 Cal.Rptr. 160.

[3] Defendants next contend that the tactics employed by counsel for the State were prejudicial and resulted in a denial of their right to a fair and impartial jury trial. They argue that counsel for the State sought to impeach one of their valuation witnesses on cross-examination by employing non-impeaching matter as though it were impeaching, in that the witness was questioned concerning a valuation which he made in the past in connection with property across the road from the subject property.

This line of questioning was acquiesced in by the defendants' counsel when, after objecting to the questioning, he stated, "Let him answer. Let him explain." Defendants' counsel also pursued the same line of questioning on the re-direct examination of the witness. Further, no objection was made to the questioning of the witness by counsel for the State with regard to the witness' familiarity with the Code of Ethics of the American Institute of Real Estate Appraisers. Defendants cannot now be heard to complain in this regard. Forest Preserve Dist. v. Chicago Title & Trust Co., 351 Ill. 48, 56, 183 N.E. 819, 822.

[4, 5] Defendants next argue that counsel for the State asked questions of the State's valuation witnesses which gave the appearance that they predicated their

opinions as to the value of the subject property upon the values of similar properties, whereas there was no evidence introduced as to the values of comparable property. On the contrary, evidence was introduced relative to the contracts for the cash sale of the instant property, entered into just four months prior to the filing of the petition to condemn. Since this was a cash sale of the premises just a short period of time prior to the filing of the petition, further evidence of comparable sales of real estate would appear unnecessary. The questions asked by counsel for the State in this regard were either not objected to by defendants' counsel or were not of such character as to have prejudiced the defendants in the eyes of the jury. See Forest Preserve Dist. v. Chicago Title & Trust Co., *supra*.

[6] Defendants also argue that the tactics by counsel for the State continuously placed defense counsel in the position of having to raise objections in the presence of the jury.

Objections raised by defendants' counsel to several questions asked by counsel for the State of two of the State's witnesses were sustained by the trial court, and testimony was ultimately elicited from those witnesses in a manner consistent with the objections so interposed. It does not appear from the record that counsel for the State "deliberately employed (such questions) as a means of forcing counsel for Appellant to be placed in a position, in the presence of the jury, of continuously having to make objections," as defendants contend in their brief.

[7] Defendants contend that the mode of proof employed by the State in attempting to show no damages to the remainder was intended and "may well have caused" the jury to deduct alleged benefits to the remainder as a

result of the taking from the value of the part taken, contrary to law.

At a conference outside the presence of the jury, the trial court specifically stated to the counsel for the State that he would not be permitted to pursue a theory that an increase in value to the remainder caused by the taking could be employed as an offset against the value of the part taken, and it does not appear from the record that such a theory was thereafter pursued by the State. Not only is defendants' contention in this regard conjectural, as is indicated by their use of the phrase "may well have caused" in stating their contention, but it does not appear that they tendered any instruction to the trial court which would have offset the effect upon the jury which the pursuance of such theory is alleged to have caused.

The case of City of Chicago v. McCartney, 216 Ill. 377, 75 N.E. 117, cited by defendants in support of this contention correctly states the law with regard to offsetting the value of land taken with the increase in value of the remainder, but it clearly has no application to the circumstances in the case at bar.

Defendants contend that the jury's verdict of no damage to the remainder after the taking was against the manifest weight of the evidence and was in part brought about by several allegedly erroneous rulings by the trial court.

[8] They initially argue that the trial court erroneously refused to strike the testimony of one of the State's witnesses who testified concerning vehicular access to the remainder based upon improved and widened roadway access from Higgins Road, since such improvement and widening were conjectural and speculative. On the con-

trary, defendants' own consulting engineer, Mr. Hansen, testified before the Village of Schaumburg Board of Trustees, in connection with an application for a re-zoning of the property, that an adequate traffic plan would be worked out to accommodate the proposed buildings and that certain improvements could be expected from the County in connection with the traffic pattern in the area. The justification offered by the defendants in their brief of the representations made by Mr. Hansen to the Trustees, that "no such plan as had been hoped for could be worked out with the State," is unavailing, inasmuch as it finds no support in the record. Consequently, the trial court did not commit error in refusing to strike this testimony, nor did the court commit error in refusing to give Defendants' Instruction Number 18 to the jury regarding that subject and in substituting the court's own I.P.I. instruction in its stead.

[9] Defendants also argue that there was no evidence adduced which showed any special benefits to the remainder brought about by the taking. The State adduced evidence that the remainder was more valuable after the taking than before the taking, that the remainder had a greater exposure to persons who might desire to work, live or patronize establishments and buildings constructed on the property, and that there was generally improved access to the remainder due to the taking, the construction of the interstate highway and the improvement of Higgins Road. The jury heard the evidence and rendered its verdict accordingly. See Forest Preserve Dist. v. Chicago Title & Trust Co., 351 Ill. 48, 183 N.E. 819; Capitol Building Co. v. City of Chicago, 399 Ill. 113, 77 N.E.2d 28.

[10] Defendants finally contend that the valuation of the remainder by the State's witnesses was predicated upon sales of real estate located at full interchanges of

other expressways, without a showing of comparability of those other properties to the subject property. Defendants did not interpose an objection that there was no showing that the other properties were comparable to the subject property. Defendants cannot now be heard to complain in this regard.

The other arguments and statements interspersed throughout the defendants' brief and reply brief have been considered by this Court and have been found to be without merit.

The evidence in this case was conflicting. The jury was presented with that evidence, viewed the subject property, and returned a verdict within the range of valuations set by the several witnesses.

Finding no reversible error, the judgment is affirmed.

Judgment affirmed.

GOLDBERG, P. J., and LYONS, J., concur.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1610

LEE N. ROMANO and SCHAUMBURG PLANET PROJECT CORPORATION,

Petitioners,

vs.

DEPARTMENT OF PUBLIC WORKS AND BUILDINGS OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

JURISDICTION

A.

SINCE NO FEDERAL CONSTITUTIONAL QUESTION WAS PASSED UPON BY THE ILLINOIS SUPREME COURT, THE WRIT SHOULD BE DENIED.

No federal constitutional issue was presented for review to the Supreme Court of Illinois and as a result no federal constitutional issue was passed upon by the Supreme Court of Illinois. See opinion of the Supreme Court of Illinois, Petition for Writ, App. 5, et seq. (The issues presented to the Supreme Court of Illinois by petitioners herein are set out in Appendix)

No federal constitutional issue was presented for review to the Appellate Court of Illinois and as a result, no federal constitutional issue was passed upon by the Illinois Appellate Court. See opinion of the Illinois Appellate Court, Petition for Writ, App. 16, et seq. (The issues presented to the Illinois Appellate Court by petitioners herein are set out in Appendix)

While an attempt was made to raise the question of Federal constitutional rights in the property owners' (petitioners herein) petition for rehearing in the Illinois Supreme Court, said petition was denied without comment and did not import a decision of the possible federal question raised. *Consolidated Turnpike Company* v. *Norfolk & Ocean View Railway Company,* 228 U.S. 326 (1913); *St. Louis & San Francisco R. R. Co.* v. *Shepherd,* 240 U.S. 240 (1916). In *Shepherd* this court said (p. 241):

> "The claim under the Carmack amendment was first set up and asserted in a petition for rehearing after the judgment in the trial court was affirmed by the Supreme Court of the State. The petition was not entertained, but was denied without passing upon the

> Federal question thus tardily raised. That question, therefore, is not open to consideration here."

American Surety Co. v. *Baldwin,* 287 U.S. 156 (1932) is to the same effect. See also *Hulbert* v. *City of Chicago,* 202 U.S. 275 (1906). In *Hulbert* in pointing out that the Supreme Court of the United States did not have jurisdiction of the writ of error to the Illinois Supreme Court presented therein, this court pointed out (p. 281):

> "Nor was a right under the Constitution of the United States necessarily involved in the determination of the cause. And the Supreme Court was justified by its rulings in omitting the consideration of rights under the Constitution of the United States. According to the practice of the court, an error not assigned is not open to review (citing case). Errors assigned, but not noticed or relied on in the brief or argument of counsel, will be regarded as waived or abandoned (citing case). And such rule of practice will be recognized by this court (citing case). It follows that this court has not jurisdiction of this writ of error (citing cases). Writ dismissed."

In the case at bar the Illinois Supreme Court determined the questions raised, as in *Hulbert,* without consideration of any Federal or State constitutional question, and under the above decisions this court has no jurisdiction of this writ of error.

B.

IN ANY EVENT, THE QUESTIONS RAISED BY PETITIONERS ARE FRIVOLOUS AND THIS COURT SHOULD THEREFORE DECLINE TO ISSUE THE WRIT.

This court has held many times that it would not pass upon a frivolous federal question. In *Consolidated Turnpike Company* v. *Norfolk and Ocean View Railway Com-*

pany, 228 U.S. 326 (1913), this court held that the claim that the judgment operated to take the property of the petitioner without compensation is not enough to justify this court in taking jurisdiction unless it also appears from the averments of fact upon which the claim must depend that the question is real and substantial. We submit that the facts (not the surmises of petitioners' counsel), as we will develop them herein, do not establish any real and substantial federal question.

The attempts to invoke the 14th Amendment provisions as to due process and just compensation, as petitioners do herein, are ordinarily not considered a basis for issuing a writ of error.

In *Dohany* v. *Rogers,* 281 U.S. 362 (1930), an eminent domain proceeding, this court pointed out (281 U.S. 369) that:

> "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it."

In *Madisonville Traction Company* v. *Saint Bernard Mining Company,* 196 U.S. 239 (1905), where this court held that a state condemnation suit could be removed to a Federal court where there was a diversity of citizenship, it stated at p. 254 of the opinion in that case:

> "But the question whether the property is authorized by the local statute to be condemned, as well as the question of the amount of compensation to the owner, could not come here by writ of error from

the state court. Such questions would not ordinarily involve a Federal right."

In *Roberts* v. *New York*, 295 U.S. 264 (1935), a condemnation proceeding, this court pointed out that not every mistake of a court in ruling on evidence amounts to a denial of constitutional immunities, though the outcome is to give the owner less than he ought to have.

> "Enough for present purposes that when the hearing has been full and candid, there must ordinarily be a showing of something more far-reaching than one of dubious mistake in the appraisal of evidence. Due process is a growth too sturdy to succumb to the infection of the least ingredient of error. 'It takes more than a possible misconstruction by a court to make a case under the Fourteenth Amendment.' " 295 U.S. 278.

If it can be said that petitioners are relying upon due process, then the answer to that is that all that is essential for due process in condemnation cases "is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process which is required by the Federal Constitution." *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co.*, 169 U.S. 557, 569 (1898).

In *McGovern* v. *New York*, 229 U.S. 363, 371 (1913), Mr. Justice Holmes stated:

> "As it is put in the case most frequently cited in favor of the right to a writ of error, 'we are permitted only to inquire whether the trial court prescribed any rule for the guidance of the jury that was in absolute disregard of the company's right to just compensation.' "

and again,

> "The final judgment of a state court 'ought not to be held in violation of the due process of law enjoined by the 14th Amendment unless by the rulings upon questions of law the company was prevented from obtaining substantially any compensation.' "

The complete facts as herein set forth demonstrate completely that the petitioners were not denied due process or just compensation.

QUESTIONS PRESENTED

The only questions actually presented in this case are whether this court has jurisdiction to grant the Writ petitioned for here and if it does, whether it should do so in light of the frivolous character of the questions raised and in light of the facts of the case as hereinafter disclosed.

The Supreme Court of Illinois has not passed upon any federal question and under the cases above cited there is no federal question before this court. Even if petitioners could be held to have properly invoked the 14th Amendment considerations, the cases above cited affirm that due process or just compensation as provided for in the 14th Amendment do not require any higher decree of responsibility for counsel for a public body in eminent domain proceedings than in any other proceedings and as they also affirm where there is substantial compensation, as there was in this case, and ample opportunity afforded petitioners to persuade a jury as to fair market value, there is no due process or just compensation question for this Court.

Further, the facts presented hereafter will disclose that petitioners were treated fairly throughout the trial, the

case was presented strictly within the Illinois rules of evidence and there was no failure of the state courts to protect the interests of the property owner.

STATEMENT OF THE CASE

In addition to using their "Statement of the Case" as a vehicle for argument rather than a true statement of the case, petitioners have been somewhat less than frank and honest in the presentation of facts and argument. They have omitted some of the most pertinent facts on which the trial court and the appellate courts of Illinois relied and pointed out in their various opinions and in their argument petitioners have tried to mislead the court as to what actually took place.

It is necessary, therefore, to present this statement of the case.

The State of Illinois through its then Attorney General and his assistants, filed on July 3 and July 8, 1968 two separate condemnation proceedings against two parcels of land comprising 20+ acres which were part of an 86 acre tract of land, not in any municipality, at the southwest corner of two 2-lane roads, Higgins Road and Illinois Route 53. The two parcels, denominated Parcel 13 and Parcel 17, were to be acquired in connection with the widening of Higgins Road (on the north end of the tract) into a 6-lane road (3 lanes in each direction) and for the construction of Interstate I-90, partly in Route 53 (on the east side of the tract). Interstate I-90 was also to have 6 lanes of traffic (3 in each direction) and was to be carried over, and have a complete interchange in connection with, Higgins Road. There were no utilities on the 86 acre tract, which was served by septic fields and one water well. It had some nursery stock on the part of it that was

not too wet and a few ramshackle buildings which housed migrant Mexican labor.

The 86 acres, which lay in a predominantly farm area, were sold by Klehm, a nursery operator and the owner of large, vacant holdings, to Schaumburg Planet Project Corporation (Romano), on March 7, 1968, just four months before the date of the filing of the petitions to condemn, for $1,700,000 or slightly less than $20,000 an acre, with the proviso that the parcel would be annexed to the Village of Schaumburg, which lay to the west, and would be rezoned for planned development use. Subsequent to the petition to condemn being filed it was so annexed and rezoned.

Shortly after the petition to condemn was filed the State filed a motion to take title to Parcels 13 and 17 (the 20+ acres here involved) under the quick take provisions and on July 16, 1968 a hearing was held on that motion which resulted in a preliminary finding as to compensation based on the testimony of one Joseph Dillon, an appraiser for the State. He testified to $484,000 for Parcel 17, including (which the attorneys, who are questioning the candor and fairness of the State, conveniently omitted to point out), $47,700 for nursery stock. He testified to $23,200 for Parcel 13 and this figure included $2,700 for nursery stock. The combined acreage of Parcels 13 and 17 was 20+ acres—the remainder of the 86 acre tract available for development was 65+ acres. He stated that in his opinion the damage to the remainder was $93,400, attributable to the taking of both tracts. Joseph Dillon's combined valuation of Parcels 13 and 17 eliminating the nursery stock (payments for which were to be made to Mr. Klehm and which was not included in valuations at the trial, 27 months later, as to final compensation) was $456,800 (not

$507,200 as stated by petitioners in their statement of the case). This was slightly above the valuation of $413,000 by the State's witness Curtis at the trial as to final compensation. No evidence as to value was produced by the property owners in the quick take proceedings. Joseph Dillon was not retained by the present Attorney General of the State of Illinois (William J. Scott) and neither were the attorneys for the State who handled the quick take. They were appointees of the previous Attorney General. At the quick take hearing, Joseph Dillon was not asked concerning, nor did he indicate that he had given any consideration to or knew of, the Klehm sale to Schaumburg Planet Project Corporation; nor was he asked as to, nor did he discuss, possible benefits to the remainder arising from the construction of the I-90–Higgins Road interchange and the widening and improving of those roads.

Parcels 13 and 17 were consolidated for trial, with the valuation date fixed as July 8, 1968.

As a result of numerous requests for continuance by the attorneys for the property owners, the trial as to final compensation did not take place until October 1970. In the meantime a new Attorney General of the State of Illinois had taken office and new (the present) trial attorneys and appraisers for the State were appointed.

At the trial the petitioners herein relied upon the testimony of two valuation witnesses (who under Illinois law were required to value the property as of July 8, 1968) who gave no consideration to the sale of the very property four months before July 8, 1968. Nor was a single comparable sale introduced to support their valuations of the part taken and their estimate of damages to the remainder in the total sum of $3,300,000—which was twice what Romano's corporation had paid four months before for the

entire 86 acres (65 of which he retained, now situated upon highly improved roads, one of them an Interstate Route).

The verdict which the jury returned of $454,300 for the 20+ acres taken (which excluded the value of the nursery trees—$50,400) was within $2,500 of the preliminary valuation in the quick take proceedings for the taking of such 20 acres.

Between the quick take proceedings in July 1968 and the trial as to final compensation in October 1970, the improvement hereinbefore described had been built and in October 1970 the jury could and did view that improvement and rode over the part of it on petitioner's property. The appraisers for the State at that time had an advantage, which Joseph Dillon did not have—visual proof of the benefits of that improvement to the remaining 60 acres.

The verdict of the jury amounted to $22,500 an acre, or $2,500 an acre more than Romano's corporation paid for the property four months before the valuation date.

There was no cavalier approach by the State to constitutional guarantees; the owners' rights were protected by the trial court; both the Appellate and Supreme Court of Illinois carefully considered petitioners' contentions; there was no prejudice introduced into the record deliberately or otherwise; there was no "false suggestion" as to access; there was no attempt to have the jury set off benefits to the remainder as against the value of the part taken; there was no prejudicial cross-examination as to an inadmissible fact, all alleged in petitioners' "Statement of the Case" in their petition for writ. To the contrary, there was strict adherence to recognized procedures as we shall demonstrate *infra*.

On the other hand, petitioners and their counsel seem to have been dedicated throughout the proceedings and ap-

peals to the proposition that by endlessly repeating the allegations they have set forth here and before the Illinois courts, which rejected them, such allegations will somehow achieve respectability and acceptance.

The matters presented to this court in support of petitioners' Petition for writ of certiorari have now been presented to and rejected by three Illinois courts on six occasions without a dissenting vote—in the trial court during the trial before a trial judge who has since been elevated to the Appellate court, on the post trial motion in the trial court, to the Appellate court of Illinois on appeal from the trial court, to the same court on petition for rehearing, to the Supreme Court of Illinois on appeal, and to the same court on petition for rehearing.

What we have here, rather than any lack of fair play on the part of the State, its counsel and the courts, is an attempt by petitioners and their attorney to extract from the treasury of the State of Illinois, by persistent repetition of accusations which have constantly been rejected and shown to be without foundation by the courts of Illinois, some 3⅓ million dollars.

If this were to happen, then counsel for the State might well be subject to criticism.

REASONS FOR NOT GRANTING THE WRIT

In addition to the jurisdictional reasons for not granting the writ, which we have heretofore advanced, we now take up the different items on which petitioners rely in arriving at their conclusion that "The State of Illinois and Its Courts Have Repudicated Their Constitutional Duty of Candor and Fairness to Citizens in Eminent Domain Proceedings" (p. 8 of Petition For Writ) which is the sole ground urged by the petitioners for the issuance of the writ.

It is rather amazing that counsel for petitioners are the only ones among the able counsel who have represented the people who have been awarded billions of dollars (8 billion in the one year of 1967 according to petitioners, page 8 of their Petition) to discover that the courts have repudiated their constitutional duty in this type of proceeding.

We submit that when we analyze the petitioners' statements and arguments we will find that the lack of candor and fairness is rather on the side of petitioners and their counsel.

A.

THE QUICK TAKE PROCEEDINGS IN THE STATE LOWER COURT AND THE VALUATIONS ARRIVED AT THEREIN ARE NOT PROPERLY A CONSIDERATION IN DETERMINING WHETHER THE JURY TRIAL AS TO FINAL COMPENSATION WAS FAIRLY TRIED.

Petitioners complain that the amount determined as preliminary compensation in the quick take proceedings in the State lower court was more than the amount awarded by the jury in the trial to determine final compensation.

The whole concept of Quick Take proceedings is that they are totally separate and apart from, and with no

bearing upon, the jury trial to determine final compensation.

Under the provisions of the Illinois statutes (Ill. Rev. Stat., c. 47, Sec. 2.2(d)) the quick take award cannot be used as evidence in the trial of the case and cannot be disclosed in any manner to the jury impaneled to decide upon compensation. As a result it does not properly have a place in the Petition for Writ; but because petitioners have seen fit to make it a part of their Petition, we point out some facts in connection with the quick take award which they have failed to point out. Among other reasons for the statutory provisions prohibiting disclosure of the preliminary compensation arrived at in quick take proceedings is that, as in the case of offers of settlement made prior to condemnation, a figure for preliminary compensation which will be higher than other appraisals in the condemnor's files is often given in an effort to get title without a fight over valuations in the quick take proceedings. This enables the quick take proceedings to be accelerated, but as everyone is aware such preliminary determination is not a guaranteed award and does not enter into the determination of final compensation.

In this case, as often happens, the attorneys for both the State and for the landowner at the time of the trial (1970) were different than those participating in the quick take proceedings (1968). The attorneys for the State in the quick take proceedings were special assistant attorneys general appointed by a different Attorney General than the present one (William J. Scott), who subsequently appointed present counsel as trial counsel for the State. The defendants had various sets of attorneys through quick take, depositions, trial and appeal.

The appraiser for the State at the quick take (Joseph Dillon) was also an appointee of a former Attorney General.

The jury trial as to final compensation was unduly delayed by numerous requests for continuance by the various attorneys for the defendants, the original trial date being June 26, 1969 and trial being finally held in October, 1970. In the meantime the improvement had been built and other appraisers employed by the State. These appraisers (and, incidentally, the jury) had the benefit of seeing the completed improvement, which has been described in our Statement of the Case.

These appraisers also had the benefit of legal advice from the State's trial attorney (who is also the State's attorney on this appeal) that a transaction (hereinabove described) between one Klehm and Romano's Corporation, one of the petitioners herein, four months before the petition to condemn was filed (the date of fixing the value of the whole of the property, of the part taken and of damages to the remainder) was a sale to which they could give consideration in arriving at their valuation and not an exchange as contended for by the property owners. They also had the benefit of advice that benefits to the remainder which resulted in the remainder increasing in value after the taking could be set off against damages to the remainder. The appraiser (Dillon) who testified at the quick take proceedings evidently did not have the benefit of such advice.

If these facts were not brought to this court's attention, one might gather from the allegations of the petitioners that there was some sort of conspiracy on the State's part to lower the value of the petitioners' property between the time of the quick take and the trial in 1970. Nothing could be further from the truth.

As the Supreme Court of Illinois has often pointed out, it is common for valuation witnesses in condemnation

cases to vary greatly in their opinions of just compensation. *City of Chicago* v. *Harrison-Halsted Bldg. Corp.*, 11 Ill. 2d 431, 436, 143 N.E. 2d 40, 44 (1957); *Illinois Light and Power Co.* v. *Bedard*, 343 Ill. 618, 620, 175 N.E. 851, 852 (1931). So it was not unusual, especially in view of their knowledge of the Klehm-Romano sale, that the three witnesses who testified for the State as to value in 1970 had slightly different ideas of value than the appraiser who testified at the quick take in 1968. They had different concepts of the applicable law. They were appraisers of repute and vast experience, having held high office in all appraisal organizations and one of them, M. Edward Smith (Excerpts From Record, p. 280) was a witness sometimes used by the property owners' trial attorney (Excerpts From Record, p. 285). Mr. Smith was not even cross-examined by Mr. Dillon when he expressed an opinion that the value of the remainder after the taking, taking into consideration the construction of the improvement, was $65,200 more than as a part of the whole before the taking (Excerpts From Record, p. 951).

The insinuation of petitioners that, because the testimony of the State's witnesses differed at the 1970 jury trial as to final compensation from that of the appraiser in the quick take proceedings, the State and its counsel were conspiring to depress the value of petitioners' property and to deprive them of certain rights is completely negated by the facts, as both the Illinois Appellate Court and the Illinois Supreme Court recognized on appeal.

Because of the varying views of different appraisers and attorneys it is not uncommon for the final verdict in an eminent domain proceedings to be less than the preliminary compensation agreed upon or fixed in quick take. Some examples of this are: In *Department of Public*

Works and Buildings v. *Christensen*, 25 Ill. 2d 273, 184 N.E. 2d 884 (1962), the compensation fixed on quick take was $34,250 and the verdict, upheld on appeal, was $21,500. In *Department of Public Works* v. *First National Bank*, 61 Ill. App. 2d 78, 209 N.E. 2d 21 (1965), the compensation fixed in quick take was $3,500; the verdict, sustained on appeal, was $1,700.

In comparing the valuation at the quick take with the valuation on trial, the petitioners again have been somewhat less than candid with the court. They state that at the quick take hearing the State's witness (Joseph Dillon) testified to $507,200 for the part taken and $93,400 for damages to the remainder. Actually, at that time (1968) Joseph Dillon was testifying to two separate parcels of land (Parcels 13 and 17) which were subsequently consolidated for trial and his actual testimony as to the value of Parcel 17 was $484,000 and the value of Parcel 13 was $23,200. (It can be noted that when the taking is consolidated, the value might well be less than the total of two separate parcels.) These figures included $47,700 for nursery stock on Parcel 17 and $2,700 for nursery stock on Parcel 13, or a total of $50,400 for nursery stock. The nursery stock, by stipulation of the parties, was not to be considered in the trial of the case and was not taken into consideration by the valuation witnesses for the State as the party (Klehm) who sold the property to Romano was to get the $50,400 for the nursery stock. Subtracting the $50,400 from the combined taking, Joseph Dillon's figure for the combined taking which should be compared to the testimony at the jury trial as to final compensation is not $507,200 but $456,800. The testimony at the trial of the State's witness, Curtis, was $413,000.

It must be readily apparent that counsel for the prop-

erty owner was not interested in a settlement even at Joseph Dillon's figures of $456,800 for the part taken and $93,400 for damage to the remainder or they would have settled at that time. They had bigger game (3⅓ million dollars) in view.

Another vital factor in considering whether this court should police condemnation proceedings in Illinois as the result of the verdict in this case, and one which the petitioners have failed to mention, is that *four months* before the petition to condemn was filed in this case Romano's corporation, one of the petitioners herein, bought the 86 acre tract for $1,700,000 or a little less than $20,000 an acre. The verdict of the jury amounted to $22,500 an acre. It must be apparent that it would be extremely difficult for any conscientious appraiser to appraise the property at much above $20,000 an acre or for any conscientious jury to award the property owners more than $2,500 per acre profit for holding title for four months.

B.

IT WAS PERFECTLY PROPER AND ACCEPTED PRACTICE FOR COUNSEL FOR THE STATE TO ASK FOR, AND FOR THE VALUATION WITNESSES TO GIVE, THE VALUE OF THE REMAINDER AFTER THE TAKING IN DOLLARS. THIS PROCEDURE WAS NOT, AS ALLEGED BY PETITIONERS, IN APPENDIX A OF THEIR PETITION FOR WRIT, ERRONEOUS AND IT WAS NOT "DELIBERATELY SUGGESTED INADMISSIBLE MATTER."

Petitioners, in Appendix A to their Petition, point out what they claim as an example of counsel for the State

deliberately suggesting inadmissible matters to the jury, namely, that under his questioning the valuation witnesses for the State testified that the remainder after the taking and the construction of the public improvement was worth more in dollars than it was as part of the whole before the taking. Petitioners also complain because an instruction was not given by the trial court (although not requested by them) that benefits to the remainder could not be set off against compensation for the part taken.

To correctly understand the position petitioners are in now it must be remembered that in their appeals in the Illinois Appellate Court and the Illinois Supreme Court, the point they were primarily relying upon was that the sale to Schaumburg Planet Project Corporation was not a sale but was an exchange of properties. They realized that there was no future to their excessive claims for compensation ($1,030,000 for the part taken, $50,000 an acre, and $2,292,500 for damages) if they were confronted with a sale of the very same property at $20,000 an acre, such sale taking place just four months before the taking.

After the Illinois Appellate Court and the Illinois Supreme Court, without dissent, had both held that the transaction was definitely a sale which was competent evidence, the objection to the admission of the sale was dropped by petitioners in their petition for rehearing in the Supreme Court of Illinois and before this court and petitioners began to reach for other straws to which to cling.

As the Illinois Appellate Court pointed out in its opinion (Petition for Writ, App. 26), the appellants (petitioners herein) did not claim that the jury was influenced in

their valuation of the part taken by the testimony as to increase in value of the remainder after the taking—the most petitioners herein claimed at that time was that this testimony "may well have caused" the jury to be influenced, a pure speculation, as the Illinois Appellate Court characterized it. With the hope of the petitioners gone that they could convince the courts that a sale for cash was really an exchange of properties, the point that they were prejudiced by the State's testimony as to the value of the remainder after the taking and the two other minor points referred to in the Appendix to the Petition for Writ are blown up out of all proportion in a desperate attempt to get another chance at 3⅓ million dollars.

The burden was on the property owners to prove damages to the remainder. *City of Chicago* v. *Provus,* 415 Ill. 618, 623, 114 N.E. 2d 793, 795 (1953). When they failed to do this, they conjured up this objection. But as far back as this counsel can remember (and his credentials are thoughtfully provided by petitioners in their Petition for Writ), witnesses have testified to the value in dollars of the remainder before the taking as part of the whole and to the value in dollars of the remainder after the taking with the improvement in place. See *Capitol Building Co.* v. *City of Chicago,* 399 Ill. 113, 77 N.E. 2d 28 (1948); *Department of Public Works and Buildings* v. *Bloomer,* 28 Ill. 2d 267, 270, 271, 191 N.E. 2d 245, 248 (1963); *Forest Preserve District* v. *Chicago Title and Trust Co.,* 351 Ill. 48, 56, 57, 183 N.E. 819, 822 (1932); *Department of Public Works* v. *Hubbard,* 363 Ill. 99, 101, 102, 1 N.E. 2d 383, 384 (1936). Recommended Illinois Pattern Instruction No. 300.45 states that "the measure of damages is the difference between the *fair cash market value* of the remainder before the taking and the *fair cash*

market value of the remainder immediately after the taking." How could one possibly testify as to the fair cash market value of the remainder after the taking without putting a *dollar value* on it? Petitioners also recognized that *value* was the criteria in their tendered Instruction No. 18 in the trial court.

In *Department of Public Works and Buildings* v. *Crumbaugh*, 1 Ill. App. 3d 761, 274 N.E. 2d 161 (1971) the question of testifying to benefits in dollars was directly raised on appeal and the Appellate court of Illinois approved the practice of testifying to a dollar value for the remainder after the taking.

Far from attempting, as charged, to suggest inadmissible matter to the jury, counsel for the State was meticulously following procedures which had been confirmed over the years.

Admittedly, the petitioners did not offer an instruction on this point. Ill. Rev. Stat. c. 110, par. 67(3) provides that: "No party may raise on appeal the failure to give an instruction unless he has tendered it." See also *Chicago Land Clearance Commission* v. *Darrow*, 12 Ill. 2d 365, 146 N.E. 2d 1 (1957), and *People* v. *Damen*, 28 Ill. 2d 464, 469, 193 N.E. 2d 25 (1963).

Petitioners' attempt to excuse themselves for not tendering an instruction by stating that the trial court had indicated he would not give anything but Illinois Pattern Instructions. This is not so. What he did indicate was that if an Illinois Pattern Instruction covered a situation, he would be inclined to give that instruction rather than one counsel had fabricated. The fact of the matter is that the trial judge (Excerpts from the Record, p. 846) stated that he was going to permit testimony in dollars as to the before and after value of the remainder

and that if there was any question a precautionary instruction could be used. In spite of this admonition, the attorneys for the property owners failed to offer an instruction. It is not likely that an attorney of Mr. Dillon's self-admitted ability (Excerpts from Record 1101) would not tender an instruction if he thought it correctly stated the law, even if a judge said he wouldn't give it.

Petitioners also did not make an objection to this testimony. See opinion of Supreme Court (App. 11, Petition for Writ).

Just on general considerations it is obvious that if an appraisal witness was not permitted to give an after taking valuation of the remainder in dollars, it is unlikely that a jury could give much credence to his testimony that there were no damages to the remainder.

In *Department of Public Works and Buildings* v. *Bloomer,* 28 Ill. 2d 267, 270, 271, 191 N.E. 2d 245 (1963), in an opinion by Justice Schaefer, it was stated:

> "Only one of the defendant's witnesses attempted to testify directly to this issue (re damage to the remainder). Upon the basis of having 'been by' the theater before the taking, and having heard the testimony of other witnesses, W. E. Thebus, a real estate broker and appraiser, stated that 'the extent of the damage, that is, the amount of money that a willing buyer would be willing to pay, would be at least $118,570.18.' In weighing this ambiguous statement the *jury was entitled to take into account that the witness did not state his opinion of the value of the tract before or after the taking* and that he did not enumerate or itemize the factors he took into account." (emphasis added)

The court in the *Bloomer* case then went on to point out that petitioner's witnesses testified in the approved

manner, directly to the issue, giving the value before and after and itemized the elements considered.

In view of the holdings in the above Illinois cases, counsel for the State could have been criticized if he had not proceeded on the question of damages to the remainder in the manner in which he did. There is no basis for petitioners' contention that he was suggesting inadmissible matter to the jury.

C.

COUNSEL FOR THE STATE DID NOT CREATE ANY FALSE IMPRESSIONS AS TO THE AVAILABLE ACCESS.

Equally without foundation is the second contention of petitioners (Petition For Writ, App. 2) involving the question of access to Higgins Road. Again it is the petitioners who are guilty of lack of candor and fairness in their statements, and not the State or its counsel. There is nothing in the record to suggest that counsel for the State was attempting to get any improper evidence before the jury in connection with access. In fact, as the Supreme Court opinion (Petition For Writ, App. 14) took care to point out, not only does the record not support petitioners' allegations to that effect in their appeal to the Illinois Supreme Court (the same allegations as in Petition for Writ on this point) but, on the contrary, the record negates such allegations. The Supreme Court opinion points out that the witness was asked by counsel for the State only to testify as to the traffic flow according to the improvement "as it is now constructed", the improvement having been constructed at the time of the trial in accordance with the plans offered in evidence.

The correct traffic flow was not only testified to by the witness in question on cross-examination when one of the assumptions he made was pointed out as erroneous, but also by an expert for the land owners (Excerpts from Record, p. 485, et seq.) and emphasized in argument to the jury by counsel for the land owners (Excerpts from Record, p. 1090, 1099). The traffic expert for the property owners was as guilty or more guilty than the traffic expert for the State in making a wrong assumption, as his calculations were made as of *1990*, not as of 1968 when the taking occurred.

In connection with the entire question of damages to the remainder, including the highest and best use of the remainder with the access afforded, which the jury viewed, it must be borne in mind that without impeachment of any kind the valuation witnesses for the property owners pointed out that the specific benefits to the remainder were (1) that being adjacent to expressways, it would sell for more even if it did not have direct access to the expressway (it had indirect and convenient access); (2) it could be seen from the expressway, which gave it identification; (3) it had improved access to a larger part of the Chicago Metropolitan Area (Excerpts from Record 943, 944); (4) it had high speed access to points North, South, East and West; and (5) that experience showed that remainders at a grade separation such as resulted from the State's construction inevitably increased in value (Excerpts from Record, 959, 960). Further, the State's valuation witnesses were able, without contradiction or impeachment, to point out specific multiple family and commercial developments which flourished with access similar to that which the remainder of the Romano Corporation property had—one such development being in Oak

Brook at 31st and Route 83 (Excerpts from Record, 926, 927), one at Cumberland Avenue and the Northwest Expressway (office building, apartment building and duplexes with a 20 foot access road) and one at Algonquin Road and the clover leaf off Route 53, where a narrow access road served a development consisting of a Holiday Inn, a restaurant, Buick Motor Service Garage, etc. (Excerpts from Record, 964, 965, 970).

D.

THERE WAS NOTHING IMPROPER IN THE CROSS-EXAMINATION OF THE WITNESS McCANN.

Finally, petitioners list as an example of improper procedures the cross-examination by counsel for the State of the property owners' valuation witness McCann. They assume that this was examination "on value of property which under the rules of evidence the cross-examiner could not put into evidence on direct examination" and cite Righeimer on Eminent Domain in Illinois and *Forest Preserve District* v. *Chilvers,* 344 Ill. 573, 176 N.E. 720 (1931) as authority for the claim that such type of cross-examination is improper.

Of course, as was recognized by all the Illinois courts, this was not an attempt by the State to put in a valuation on cross-examination which could not be put in on direct. It was an attempt to impeach the witness by showing that he did not approach the valuation of similar properties directly across the street from each other with impartiality but that when he testified on the property across the street his valuation per acre was considerably less than when he testified for Romano and that, unlikely as it seems, although the properties were similarly af-

fected by the improvement, he did not testify to and did not have an opinion as to damages to the remainder of the tract across the street, while he had an opinion that Romano's remainder was damaged $2,292,500. There was no obstacle which would have precluded the State from calling this witness as its witness and eliciting this information and therefore the quotation from Righeimer has no application to this case. In the situations referred to in the quote from Righeimer, there were obstacles—such as a sale which could not be introduced on direct because it was not comparable or a sale which could not be introduced on direct because the purchaser had the power of condemnation.

In *Forest Preserve District* v. *Chilvers*, 344 Ill. 573, 176 N.E. 720 (1931), cited by petitioners, the Voss property as to which inquiry was made on cross-examination was totally dissimilar to the property involved in the condemnation proceedings as it was subdivided property which the property being condemned was not and as the Voss property was improved with a twelve-flat apartment building, whereas the property being condemned was improved with a one-story stucco building; the Voss property was zoned for apartments, the property being condemned for single-family residences. 176 N.E. 721, 722. But the Romano property and the property across the street from it were both vacant tracts, with similar frontages on Higgins Road and Route 53, with similar topography, and with remainders having similar access problems.

The cross-examination for impeachment purposes was proper. *State ex rel.* v. *Collier*, 93 Id. 19, 454 P. 2d 56 (1969); *State ex rel.* v. *Cole Fire Protection District*, 92 Id. 810, 451 P. 2d 1011 (1969); *California ex rel.* v. *Stevenson*, 5 Cal. App. 3d 60, 84 Cal. Rptr. 742 (1970).

On this point once again counsel in his Petition for Writ has omitted facts which bear directly on the question raised. This is probably because counsel did not participate in the trial and is not wholly familiar with the record. But whatever the reason, petitioners have failed to point out that not only did they not object (Excerpts from Record, pp. 722, 723) for the spurious reason they advance that an objection was useless (App. 4, Petition for Writ); but also that the trial attorney for the landowners did not move to strike the testimony. He in fact welcomed such inquiry with this statement: "Let him answer * * * let him explain it" (Excerpts from Record, p. 722).

Appellate courts in Illinois have consistently held, as have federal courts and courts in other states, that experienced counsel, "cannot take a chance of failing to make objection and then, upon receiving what they consider an adverse verdict, claim error". *County of Cook* v. *Colonial Oil Corp.*, 15 Ill. 2d 67, 75, 153 N.E. 2d 844, 848 (1958); *City of Chicago* v. *Giedraitis*, 14 Ill. 2d 45, 50, 150 N.E. 2d 577, 580 (1958).

Once again it appears that counsel for the State rather than having indulged in any improper conduct was merely trying the case as best he could by established rules. The plea of the petitioners here is a plea for counsel for the State in some nebulous, unexplained way to represent the property owner as well as the taxpayers of the State. It seems obvious from the unsupported, unbelievable testimony of the paid witnesses for Romano and his corporation that counsel for the State has enough of a task in preventing the treasury of the State from being raided. Not only were the attorneys for the petitioners herein

content to put on this unbelievable testimony, they also succeeded in keeping out evidence that these petitioners had (in a hurried effort to induce the village officials to upgrade the rezoning on this property prior to trial and consequently attempt to provide a basis for unconscionable valuations) stated to the Village of Schaumburg officials that the access to be furnished by the State would create no problems as to the remaining property as they wished it rezoned (State's Exhibit 26 for *id.*).

The frenzy with which counsel for the property owners were attempting to harness the State with compensation for the taking of 20.65 acres and damage to the remaining 65 acres in a total sum of $3,300,000 (or more than twice what they paid for the whole 86 acres four months before) is also indicated by these excerpts from the final argument of counsel for the land owners:

> "I am thankful I don't have to negotiate the case with Frank Righeimer." (Excerpts from Record, 1077)
>
> "You don't know what the tax consequences of Klehm's transactions were." (Excerpts from Record, 1078)
>
> "If you want my guess, the fellow who is in real serious trouble is little Jim Curtis * * * he is not an honorable honest person in this courtroom." (Excerpts from Record, 1090)
>
> "* * * when you have written out the verdict that you are going to give in this case, I want you to go back out to that area, satisfy yourself in your own mind that you treated a fellow citizen fairly and go out and talk to Campanella, and go out and talk to Leavitt, and talk to other realtors and the owners in the area and ask them what you can buy it for.
>
> "Now, if you can buy that property for $20,000 an acre, God love you, and you don't stay home tomor-

row. Go out. See your mortgage banker, borrow on your life insurance, sell your automobile, get all the money together that you can get, because I am going to say I know twelve millionaires. I met them up there in Judge Egan's courtroom in 2307, because that is exactly what each one of you can be, and you can be it within 48 hours. If you can buy this property for $20,000, you will be able to sell it immediately for $50,000." (Excerpts from Record 1099, 1100)

"* * * and that's their whole case, besides Mr. Derrah, and we don't know what circumstances were involved in his leaving Real Estate Research Corporation." (Excerpts from Record 1101)

"If this was your property that was being condemned, who would you go to see? Would you take Curtis' opinion and Derrah's opinion? Would you want Righeimer representing you? I will lay it on the line. I think this jury would take Dillon ***." (Excerpts from Record 1101)

"* * * and this is a difficult condemnation case and you should have had more of this explained to you by Mr. Righeimer, instead of having me take up my time." (Excerpts from Record 1105)

"I want you to know who was the phony in this courtroom, and who put up the phony witnesses on the stand, and who masqueraded in here." (Excerpts from Record 1111)

"* * * and it is a pity that the State of Illinois sees fit to do this to a piece of property * * *. Don't make this client pay for the mistake of the Department of Road (sic) and Buildings of the State of Illinois." (Excerpts from Record 1112, 1113)

CASES CITED BY PETITIONERS

The cases cited by petitioners in support of their Petition for Writ (Pp. 10 and 11 of Petition for Writ) are most inapposite. *Mooney* (294 U.S. 103), *Napue* (360 U.S. 264), *Giglio* (405 U.S. 150) and *Brady* (373 U.S. 83) all involved actions of the prosecuting attorney in criminal cases in which the prosecution was based on known and uncorrected perjured testimony (*Mooney*) or the failure of the prosecuting attorney to disclose to the jury that convicted witnesses for the prosecution had been promised consideration for their testimony although on examination conducted by the State's Attorney, the witnesses testified that they had not been promised any consideration (*Napue* and *Giglio*) or the deliberate suppression by the State in the trial of one of two defendants of the confession of his fellow defendant (*Brady*). In each of these cases the damaging evidence was allowed to go *uncorrected.*

These were deliberate, knowing acts of a prosecutor to obtain a verdict he knew was not justified by the evidence. Apart from the fact, as the petitioners themselves admit, that there is a different standard of protection of defendant's rights in criminal cases than in civil cases, there is nothing in the facts as to the trial of the case at bar which could be correlated with the acts of the prosecutor in the cited cases.

Lynch v. *Household Finance Corporation,* 405 U.S. 538 (cited at p. 11 of the Petition for Writ) is inapposite because in the case at bar there was no attempt to minimize individual rights in property guaranteed to them by the Constitution. The question of individual rights *vis a vis* property rights is a straw man, set up by petitioners.

CONCLUSION

Irrespective of whether there is any obligation upon the State, its counsel and State Courts to coddle the owner of property in State eminent domain proceedings and irrespective of whether the standards applicable to the State, its counsel and the courts in such proceedings are different than in any other civil litigation or different than for any other litigant (and there has been no showing by petitioners herein to that effect), it is clear that in the trial of this case the trial procedures which have been sanctioned over a long period of time were strictly adhered to by the State, its counsel and the Illinois Courts and that there is no basis for claiming that the petitioners did not have due process or did not get just compensation.

The writ should be denied.

Respectfully submitted,

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APPENDIX

The following issues were presented for review by appellants (petitioners herein) before the Illinois Supreme Court (P. 2 appellant's brief before the Supreme Court of Illinois):

"1. Whether the trial judge erred in receiving in evidence a contract involving a trade or exchange of the subject property consisting of 86 acres for cash and 843 acres of other land in Cook, Lake and McHenry Counties.

2. Whether, in a condemnation proceeding involving a partial taking, valuation witnesses for the State may express, in dollar amounts, an increase in the value of the remainder not taken alleged to have been brought about by the public improvement and, if so, whether an admonitory jury instruction must be given informing the jury not to deduct from the value of the part taken any increase in value to the remainder.

3. Whether the verdict of the jury finding no damage to the owner's remaining property not taken by the State is contrary to the manifest weight of the evidence and resulted from improper and misleading testimony introduced by the State and erroneous rulings by the trial judge.

4. Whether the owner's right to a fair and impartial trial was prejudiced by trial tactics utilized by counsel for the State."

No Federal constitutional issue was presented or passed upon.*

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* While mention is made in the title to Point III of appellant's (petitioners herein) brief in the Supreme Court that "The constitutional right of the owner to just com-

The following issues were presented for review by appellants (petitioners herein) before the Illinois Appellate Court (appellant's brief, p. 2, Appellate Court):

"1. Whether the trial court erred in receiving in evidence a trade or exchange of the subject property consisting of 86 acres and 843 acres of other land in Lake, Cook and McHenry Counties.

2. Whether the Appellant's right to a fair and impartial trial was prejudiced by the trial tactics utilized by counsel for the State.

3. Whether, in a condemnation proceeding involving a partial taking, valuation witness may express in dollars an increment in the value of a remainder after the taking in excess of the values of the remainder as a part of the whole prior to the taking.

4. Whether the trial court ruled correctly in failing to strike the testimony of certain of the State's witnesses.

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pensation was totally defeated by a State witness and counsel for the State deliberately misleading the court and the jury concerning crucial facts which led to the jury's verdict finding no damage to the owners' remaining property" and the same general statement is repeated in the text, the 14th Amendment is not specified and no Federal question is raised. Just compensation is also provided for by the Illinois constitution. The alluded to constitutional right which was allegedly defeated was not argued as such and the Illinois Supreme Court in its decision did not consider, discuss or allude to any constitutional question, much less any Federal constitutional question.

5. Whether the verdict of the jury finding no damages to Appellant's remaining property not taken by the State is contrary to the manifest weight of the evidence.

6. Whether the trial court ruled correctly on certain objections to evidence."